Nos. 79-815 and 79-819

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOSEPH DiPALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

SALVATORE LOMBARDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a)[1] is reported at 606 F. 2d 17.

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[1]The opinion of the court of appeals is reproduced in the appendix to each petition. For the sake of convenience, all references here to the appendix will be to that in No. 79-815.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1979, and petitions for rehearing were denied on October 25, 1979 (Pet. App. B). The petition for a writ of certiorari in No. 79-815 was filed on November 23, 1979, and the petition in No. 79-819 was filed on November 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, an in-court identification of petitioner DiPalermo was reliable (No. 79-815).

2. Whether there was sufficient evidence independent of the in-court identification to support petitioner DiPalermo's conviction (No. 79-815).

3. Whether co-conspirator statements were properly admitted against petitioner Lombardi (No. 79-819).

4. Whether the prosecutor's closing argument deprived petitioner Lombardi of a fair trial (No. 79-819).

5. Whether the trial court, in sentencing petitioner DiPalermo, properly considered hearsay evidence of petitioner's involvement in organized crime (No. 79-815).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy to manufacture and possess methaqualone with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner DiPalermo was sentenced to seven years' imprisonment, to be followed by a lifetime special parole term, and was fined $10,000. Petitioner Lombardi was sentenced to five years' imprisonment, to

be followed by a five-year special parole term, and was fined $10,000. The court of appeals affirmed (Pet. App. 1a-10a).

1. The evidence at trial, which is described in the opinion of the court of appeals, showed that petitioner DiPalermo was at the center of a methaqualone manufacturing operation that included petitioner Lombardi and co-defendants George Gillette and Alan Kassebaum.[2] Briefly, the evidence showed that in April 1977 defendant Gillette told Vincent Marchese, a government informant, that he had a friend named "Herman" (later determined to be petitioner Lombardi) who had manufactured quaaludes previously but needed an assortment of new chemicals in amounts totalling about 490 pounds (Pet. App. 3a). Marchese agreed to find a source, but instead he contacted the DEA, which in turn secured the chemicals legally. "Herman" agreed to the $10,000 purchase price; Marchese and Gillette picked up the chemicals on June 23, 1977, and moved them to a secure warehouse in New Jersey (*ibid.*).

Petitioner Lombardi, who had been identified as "Herman" through DEA surveillance, failed for some four months to find a suitable location for a laboratory. Finally, in mid-September 1977, petitioner DiPalermo and two associates visited 135 Ellis Street on Staten Island. That location contained a house and dock and was quite isolated (Pet. App. 3a-4a). About a month later, Gillette was seen at the same location and was then observed by surveilling agents in a rendezvous with petitioner DiPalermo in lower Manhattan. A week later, these actions were repeated (*id.* at 4a).

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[2]Gillette and Kassebaum were also convicted at trial on charges arising from the methaqualone manufacturing operation. Gillette was sentenced to five years' imprisonment and Kassebaum to three years' imprisonment.

Some five days later, Marchese and Gillette moved the chemicals from the New Jersey warehouse to petitioner Lombardi's residence. Later that day, petitioner Lombardi was seen driving a truck on a route to the Ellis Street location, but he apparently became concerned about being followed and returned to his home (Pet. App. 4a-5a). Later that night, the truck was observed at 135 Ellis Street, where the chemicals were unloaded. Gillette later told Marchese that "Herman" had successfully delivered the chemicals despite his awareness of DEA surveillance (*id.* at 5a). Gillette also told Marchese that he would have to report the DEA's presence to his "friend in New York," one "Joe Beck," an alias for petitioner DiPalermo (*ibid.*).

Kassebaum, a licensed New York pharmacist, was recruited to do the actual manufacturing of the methaqualone. He was observed on a number of occasions at 135 Ellis Street and was overheard reporting on his progress (Pet. App. 5a). Kassebaum was arrested on November 14 a short distance from the laboratory. He broke free and attempted to flush some of the methaqualone down the toilet, but he was subdued. A more thorough, warranted search of the laboratory revealed quantities of methaqualone and the chemicals that Marchese had provided the conspirators (*id.* at 6a).

2. At petitioner DiPalermo's sentencing, he contested the pre-sentence report's conclusion that he was a high-ranking member of the Luchese crime family. As a result, the trial court held a hearing at which the government presented the testimony of three FBI agents who collectively reported information from 13 reliable informants that petitioner was a captain in the Luchese family. In addition, one criminal associate's testimony

was presented, as well as a recording of a wiretap that demonstrated petitioner's intent to murder the associate (S. Tr. 24-100).[3] In order to protect the informants' safety, the identities of the informants and the agents' notes were not revealed (*id.* at 46). In sentencing DiPalermo to imprisonment for seven years, to be followed by a lifetime special parole term, the trial court stated that it was "to some extent influenced by what I have heard here in Court concerning [petitioner's] alleged connections with organized crime and other matters" (*id.* at 106-107).

ARGUMENT

1. Petitioner DiPalermo contends (79-815 Pet. 8-16) that his identification at trial by Ryland Luttrell, the caretaker at 135 Ellis Street, as one of the men who had visited that site, was improperly tainted by Luttrell's viewing of a pretrial photographic array. Petitioner also contends (79-815 Pet. 16-17) that absent this assertedly tainted identification, there was insufficient evidence to support his conviction. These fact-bound claims were properly resolved against petitioner by both courts below, and further review is unnecessary.

a. At the outset, we note that petitioner concedes (79-815 Pet. 12), as he must, that the challenged identification must be reviewed under the rule of *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), *i.e.*, whether "in the totality of the circumstances" the in-court identification was reliable even if the pretrial identification was suggestive. Under the *Manson* rule, "reliability is the

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[3] "S. Tr." refers to the transcript of the sentencing hearing of November 3, 1978; "H. Tr." refers to the transcript of the pretrial suppression hearing of July 31, 1978; and "Tr." refers to the trial transcript.

linchpin in determining the admissibility of identification testimony" (*id.* at 114). The factors to be considered (first set forth in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972)), "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation" (*Manson*, *supra*, 432 U.S. at 114).

Luttrell's identification of petitioner DiPalermo satisfies these criteria. Contrary to petitioner's assertions (79-815 Pet. 14), Luttrell had both ample time to observe petitioner and "motivation to study" him.[4] As the court of appeals observed (Pet. App. 8a), "Luttrell, after all, was responsible for scrutinizing visitors to the Ellis Street location, and he had a good deal of time during which to view DiPalermo, some of which was spent at relatively close range." Moreover, Luttrell was "certain" of his identification of DiPalermo (H. Tr. 10, 25-26, 50, 54; Tr. 568), and he was very careful in his testimony not to exaggerate—he testified for example, that Kassebaum "resembled" the man who had occupied the Ellis Street house and that another man "look[ed] like" one of the

[4]Luttrell testified that, on a Sunday approximately two weeks after Labor Day 1977, a car arrived at the Ellis Street site (Tr. 560, 594). DiPalermo exited from the rear seat; Luttrell watched him carefully, because he at first thought that DiPalermo was crippled, and Luttrell feared he would be held responsible if the man should fall on the decaying dock (H. Tr. 11, 45). While the precise amount of time that DiPalermo was in Luttrell's presence is not a matter of record, DiPalermo was present for the following events: the car pulled up to the dock, three men exited, the two younger men had a conversation with Luttrell and then returned to DiPalermo to confer with him, and the two men then returned to Luttrell to speak to him again (H. Tr. 10; Tr. 561-568).

two who had chauffeured DiPalermo (Tr. 575-576; H. Tr. 29). Finally, Luttrell did not testify at [illegible] about the pretrail photographic identification, and [illegible] trial court instructed the jury that it was to acquit DiPalmero if it had any "reasonable doubt as to the accuracy of [Luttrell's] identifiction" (Tr. 1580). Under these circumstances, Luttrell's in-court identification of DiPalermo was reliable. *Manson* v. *Brathwaite*, *supra*, 432 U.S. at 114-115; *United States* v. *Williams*, 596 F. 2d 44, 48-49 (2d Cir. 1979); *Cronnon* v. *Alabama*, 587 F. 2d 246, 249-250 (5th Cir.), cert. denied, 440 U.S. 974 (1979).[5]

b. Nor is there any merit to petitioner DiPalermo's argument (79-815 Pet. 16-17) that there was no evidence, absent Luttrell's identification, to sustain his conviction. The evidence showed that, in addition to DiPalermo's visit to the Ellis Street site at a time when the conspirators were having difficulty locating a laboratory, petitioner had two meetings on the street with co-defendant Gillette, from which the jury properly could have inferred that petitioner was giving directions to Gillette concerning the methaqualone manufacturing operation. Gillette was first observed by DEA surveillance at the Ellis Street site on October 18, 1977 (Pet. App. 4a; Tr. 945). The same day, about 15 minutes after making some telephone calls from a public booth, Gillette met with petitioner on a street corner in lower Manhattan, a block from petitioner's home. A DEA agent walking by the two overheard petitioner say, "It's a

[5]A claim identical to petitioner's contention (79-815 Pet. 13 n. *) that his counsel should have been present at the photographic display was, of course, considered and rejected by this Court in *United States* v. *Ash*, 413 U.S. 300 (1973). Petitioner suggests no reason for reconsidering that ruling.

lot of money;" Gillette replied, "I know it's a lot of money. That's why you got to straighten it out" (Pet. App. 4a; Tr. 662, 1010). Eight days later these events were repeated: Gillette left 135 Ellis Street, met petitioner at the same intersection in Manhattan, at which time petitioner was overheard saying, "This is what you do" (Pet. App. 4a; Tr. 947-950, 965-969). Five days later the chemicals were moved from the New Jersey warehouse to the Ellis Street laboratory (Pet. App. 4a).

These were far from coincidental actions, as the trial court noted (S. Tr. 20-21), and they justified the admission of a statement made by Gillette to Marchese on November 8 that the DEA surveillance that was observed by the conspirators on October 31 could have resulted from his meetings with petitioner DiPalermo (Pet. App. 5a; Tr. 224; C.A. App. A37).[6] In sum, despite petitioner's attempts to insulate himself, the evidence demonstrated his leadership role in the conspiracy.

2. Petitioner Lombardi contends (79-819 Pet. 12-18) that there was insufficient evidence of his participation in the conspiracy to justify the admission of co-

[6]Petitioner complains (79-815 Pet. 17) not about this statement but rather about an earlier statement by Gillette to Marchese that petitioner was his "friend in New York." But under the Second Circuit's rule that "hearsay [co-conspirator] declarations" may not be considered against a defendant unless "independent nonhearsay evidence" establishes his "participation in the conspiracy" by a "fair preponderance of the evidence" (*United States* v. *DeFillipo*, 590 F. 2d 1228, 1236 (2d Cir.), cert. denied, No. 78-6411 (June 4, 1979), citing *United States* v. *Geaney*, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970)), neither the district court nor the court of appeals could consider that statement against petitioner DiPalermo unless it found that "a fair preponderance" of the independent evidence linked him to the conspiracy. As we have shown above, the independent evidence of petitioner's involvement was substantial.

conspirators' statements against him and that certain of the statements were not made in furtherance of the conspiracy. Again, these fact-bound questions were resolved against petitioner by both courts below, and they do not merit further review in this Court.

The independent, nonhearsay evidence at trial concerning petitioner Lombardi demonstrated that he was indeed a part of the conspiracy. On June 30, 1977, Gillette was seen driving away from the area of the New Jersey warehouse where the chemicals were stored, and his car was seen parked shortly thereafter in front of petitioner Lombardi's house; later that same day Gillette met with Marchese at the New Jersey warehouse and discussed the status of plans for storing the chemicals (Tr. 96, 862-863). On September 15, 1977, Gillette met with Marchese at the warehouse in the morning and later that day was seen leaving petitioner's home (Tr. 114-115, 638-643). Most importantly, Gillette drove the rental truck containing the chemicals from the New Jersey warehouse to petitioner's home on October 31, and later that day petitioner was seen driving the truck on a route leading to the Ellis Street laboratory (Pet. App. 4a-5a, 9a; Tr. 201, 734-735, 741, 743, 786-789, 951, 956-958).

This evidence, which, as the court of appeals noted (Pet. App. 11a), must be viewed " 'not in isolation but in conjunction[,]' " obviously established petitioner's participation in the conspiracy by a fair preponderance. Petitioner's claim that the Second Circuit's "fair preponderance" standard for the admission of co-conspirator statements conflicts with this Court's decision in *United States* v. *Nixon*, 418 U.S. 683 (1974), because dictum in *Nixon*, addressed to a different point, suggests a standard of sufficiency "to take the question to the jury" (*id.* at 701 n.14), is no more worthy of

review in this case than were identical claims in three previous cases in which the Second Circuit expressly declined to follow the *Nixon* dictum and this Court denied certiorari. *United States* v. *Mangan*, 575 F. 2d 32, 42 (2d Cir.), cert. denied, 439 U.S. 931 (1978); *United States* v. *Glazer*, 532 F. 2d 224, 228-229 (2d Cir.), cert. denied, 429 U.S. 844 (1976); *United States* v. *Wiley*, 519 F. 2d 1348, 1350-1351 (2d Cir. 1975), cert. denied *sub nom. James* v. *United States*, 423 U.S. 1058 (1976).

Petitioner's claim (79-819 Pet. 16-18) that some of the hearsay statements were not made in furtherance of the conspiracy and hence should not have been admitted against him is similarly lacking in merit. The statements in question, *i.e.* that Gillette said that "Herman" asked him if he could provide chemicals, and that "Herman" said he had manufactured quaaludes previously but had run out of chemicals (Tr. 68-69, 78), clearly relate to the formation of the conspiracy, for they show why Gillette was seeking Marchese's aid in locating chemicals. The next statement, dealing with petitioner's part-time residence in Staten Island (79-819 Pet. 18; Tr. 90), was made during a discussion about the delay in finding a suitable site for a laboratory. As such, it too was in furtherance of the conspiracy, for Gillette used "Herman's" absence from New York to explain the delay and assuage Marchese's concerns. The district court, therefore, acted well within its discretion in admitting these statements.[7]

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[7]In a related argument, petitioner Lombardi contends (79-819 Pet. 18-19) that the admission of Gillette's statements under the co-conspirator exception to the hearsay rule violated petitioner's confrontation rights under the Sixth Amendment. This claim is without merit, for this Court has consistently approved the constitutionality of admitting evidence pursuant to recognized exceptions to the hearsay rule. See, *e.g.*, *Mattox* v. *United States*, 156 U.S. 237, 240-244 (1895); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965); *California* v. *Green*, 399 U.S. 149, 165-168 (1970). Indeed, this Court has never found a Confrontation Clause violation where disputed statements were admitted under the federal co-conspirator's exception (see also *Ottomano* v. *United States*, 468 F. 2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); *United States* v. *Addonizio*, 451 F. 2d 49, 71 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972)), and it has three times recently declined to review this issue. *Viner* v. *United States*, cert. denied, 436 U.S. 904 (1978); *McKethan* v. *United States*, cert. denied, 439 U.S. 936 (1978); *Moody* v. *United States*, cert. denied, No. 78-6878 (Oct. 1, 1979).

3. Petitioner Lombardi also argues (79-819 Pet. 20-26) that certain remarks made by the prosecutor in closing argument require a new trial. The court below reviewed these statements and properly found them not to merit reversal (Pet. App. 10a).

The record demonstrates that petitioner could not have been prejudiced by the comments in question. For example, the prosecutor's reference to the instant case as one involving "narcotics" (79-819 Pet. 23; Tr. 1220-1221) was quickly corrected by the district court, which then allowed the prosecutor to use the shorthand term "drug" case (Tr. 1220-1221). The prosecutor's reference to $10 million worth of drugs being kept off the streets (79-819 Pet. 23), was, in fact, supported by the record, which showed that, given the volume of chemicals purchased, the laboratory was capable of manufacturing two million methaqualone tablets at a street value of five to seven dollars per tablet (Tr. 79, 1071). Similarly, the alleged vouching for witnesses' credibility (79-819 Pet. 24) was, in reality, merely an argument that the witnesses had no motive to distort the truth (Tr. 1225-1228, 1247-1248, 1517). Each objection, moreover, was followed by a

cautionary instruction that the jury was to decide the case on the evidence, not arguments of counsel (Tr. 1247, 1518).[8] In a similar vein, the prosecutor himself tried to correct his unfortunate comments concerning defense counsel's purported agreement with him that "Herman" was guilty (79-819 Pet. 25; Tr. 1258, 1280). Finally, the comments about defense counsel's "gimmicks" (79-819 Pet. 24; Tr. 1250-1251) were merely legitimate responses to petitioner's attorney's tactics in cross-examination of the DEA agent who identified petitioner as the driver of the rental truck on October 31 (Tr. 810-823). In short, no reversible error occurred.

4. Finally, petitioner DiPalermo argues (79-815 Pet. 18) that he was entitled to cross-examine the confidential informants at his sentencing hearing and that he should have been provided prior statements of the agents, pursuant to the Jencks Act, 18 U.S.C. 3500. As petitioner points out (79-815 Pet. 18), these are the same issues that have been raised in the pending petition in *Fatico* v. *United States*, No. 79-789. We rely on the analysis contained in our brief in opposition in *Fatico*, a copy of which we are providing to counsel for petitioner.

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[8]Likewise, the prosecutor's statement that there was "uncontradicted evidence" in the case (Tr. 1547), when viewed in context, was merely a reference to the fact that the defendants' cross-examination had failed to discredit the evidence of the conspiracy. An objection interrupted the completion of this statement; hence, the trial court's curative instruction was not even required (Tr. 1547).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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